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March 29, 1993

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Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments of ARINC
Tariff Filing Requirements for Nondominant Common Carriers (NPRM), CC Docket No. 93-36

Dear Ms. Searcy:

Enclosed for filing please find an original and nine copies of the Comments of Aeronautical Radio, Inc. ("ARINC"), in the above-captioned proceeding.

Please stamp the enclosed duplicate as received and return it for our records.

Should any questions regarding these comments arise, please contact the undersigned counsel.

Respectfully submitted,

Rosemary C. Harold

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36

COMMENTS OF AERONAUTICAL RADIO, INC.

Aeronautical Radio, Inc. ("ARINC"), by its attorneys, hereby submits its comments on the February 19, 1993, Notice of Proposed Rulemaking in the above-captioned proceeding. ARINC welcomes this opportunity to address an issue that is critical to the users of nondominant carrier services. ARINC generally supports the Commission's proposal to "streamline" its tariff filing rules for domestic nondominant common carriers in a manner consistent with the agency's statutory obligations.[1] But, in addition, ARINC urges the Commission to include appropriate measures in the final rules to provide stability for users in their negotiated long-term contracts with common carriers, just as they would enjoy in a traditional competitive marketplace.

ARINC is the communications company of the air transport industry and operates on a not-for-profit basis. ARINC frequently represents airline interests in government forums. The airlines are large users of telecommunications services

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[1] Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, ¶ 2 (released Feb. 19, 1993).

and generally obtain those services pursuant to long-term arrangements such as Tariff 12 and, prior to AT&T v. Federal Communications Commission, 978 F.2d 727 (D.C. Cir. 1992), contracts with the other major long-distance carriers. Unfortunately, that recent court decision has created uncertainty about the continuing reliability of some of those deals.

The airlines are understandably concerned that their legitimate business expectations will be frustrated -- and the benefits of their contracts lost -- by this abrupt change in the legal landscape. It is, therefore, incumbent upon the

typically long-term commitments have enabled users such as the airlines to obtain long-distance telecommunications services under reasonable terms and conditions and, thereby, to make reliable business projections concerning future needs. Thus, these private contractual arrangements ultimately serve the public interest.

Nonetheless, under the "tariff precedence" doctrine, such user-carrier agreements are not mutually enforceable. Instead, interexchange carriers operating under tariffs may change the rates, terms and conditions established in long-term contracts through unilateral action -- simply by making a new tariff filing.

Although traditional contract law would label such conduct a material breach, the Communications Act as currently applied by the Commission allows tariffs that abrogate rate stability commitments or other material terms and conditions in long-term agreements to take effect merely upon a showing of "substantial cause" for the change.[3] This

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[3] See RCA American Communications, 86 FCC 2d 689, 705 (1981); see also RCA American Communications, Inc., 2 FCC Rcd 2363, 2367-68 (1987), aff'd, Showtime Networks, Inc. v. F.C.C., 932 F.2d 1 (D.C. Cir. 1991). As the Commission has explained it, the "substantial cause for change" test

> is a tool for defining the appropriate zone of reasonableness applicable to changes to long-term tariffs under Section 201(b) . . . . The [] test is applied in these circumstances because the carrier's customers may have agreed to the lengthy service term in reliance on the carrier's not

(continued...)

standard is not difficult to satisfy; causes such as unanticipated rates of inflation, increased competition or insurers' reassessment of perceived risk have been found to meet the carriers' burden.[4] As a result, the tariff precedence doctrine permits carriers to escape from commitments they later deem to be undesirable while users remain bound to their end of much less attractive bargains.

The recent AT&T decision exacerbates the risks to users arising from this legal anomaly. By requiring all carriers to file tariffs -- which are, in turn, typically subject to minimal review at best -- the AT&T decision substantially increases user exposure to adverse tariff revisions. Moreover, the tariff preference doctrine tilts the "playing field" in favor of carriers in all negotiations for long-term agreements, because it offers carriers an ultimate loophole for evading the consequences of any bargain that -- from the carriers' perspective -- may become less desirable. As a

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[3](...continued)
changing its rates during the term. Under this test, the reasonableness of a carrier's proposal to make material revisions to tariff provisions in the middle of a tariff term depends greatly upon the carrier's explanation of factors demonstrating substantial cause for the desired changes at the time the proposed revisions were filed.

2 FCC Rcd at 2363.

[4] 2 FCC Rcd at 2365, 2367-68.

result, it runs counter to the Commission's general pro-competitive approach to telecommunications policy.

Beyond the policy implications for the agency, the tariff preference doctrine harms users. By permitting carriers to avoid their contractual obligations, the doctrine deprives users of certainty, a fundamental predicate to their ability to set budgets and compare bids from competing service providers. The substantial and unnecessary costs engendered by such unwarranted frustrations of settled business practices inevitably will be passed on to the public.

In addition, many users do not realize that their contracts with carriers are not mutually enforceable and, accordingly, fail to take steps to protect their interests. Even those users who understand the implications of the tariff preference doctrine must expend substantial time and energy in attempting to minimize their exposure. Their ability to do so is, however, imperfect.

Indeed, even users who secure the right to terminate their agreements without liability in the event of a rate increase still must incur substantial costs in transferring their operations to a new carrier. In other cases, users are forced to make concessions on other terms and conditions in exchange for an escape clause -- though their right to this

protection is unquestioned between parties bargaining in an unregulated marketplace.

II. In Keeping With Long-Standing Commission Policy, the Nondominant Carrier Tariff Filing Rules Should Replicate the Protections Inherent in a Competitive Marketplace to the Maximum Degree Possible

The Commission's final action pursuant to the AT&T decision can and should be guided by the pro-competitive principles which have served the nation's telecommunications policy well over the past decade.[5] Thus, tariff filing rules for nondominant carriers should be designed to duplicate, as much as possible, the incentives and attributes of a competitive marketplace. While no regulated system can substitute perfectly for an open competitive market, the Commission can foster the continued development of increased and improved telecommunications services through its new tariff filing rules and a revised tariff preference policy.

To that end, ARINC submits that the Commission should take the following steps. Initially, it should require notice to affected parties before carriers file a tariff that would abrogate a negotiated rate stability commitment or material term or condition of service in an underlying long-

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[5] As the agency recognizes, the D.C. Circuit "do[es] not quarrel with the Commission's policy objectives" behind the forbearance policy, but merely found that the Commission lacked the statutory authority to permit nondominant carriers to avoid filing tariffs. AT&T, 978 F.2d at 736.

term contract. Concomitantly, any such tariff should be filed only on 120 days' notice.

To close the tariff preference loophole, the Commission should suspend such filings for the full statutory period and require a detailed and compelling demonstration that the increased rates or modified terms or conditions are just and reasonable. In conjunction with this policy change, the Commission should state that such filings, like above-price cap rates, will be found lawful only in "rare instances, if any."[6]

Furthermore, to approximate the protections inherent in unregulated contracts, the Commission should provide that, if any such filing is allowed to take effect, the customer may terminate service without liability, notwithstanding any tariff or contract provision to the contrary. Finally, pursuant to Sections 201(b) and 205 of the Communications Act, the Commission should declare unlawful tariff filings that seek to abrogate commitments made in long-term tariffs not to modify rates, terms and conditions.[7]

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[6] Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6852, n.400 (1990).

[7] See 47 U.S.C. §§ 201(b), 205.

III. Conclusion